BAUER (M) SDN BHD v. KUKDONG ENGINEERING & CONSTRUCTION CO LTD

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(C)(A)-1210-07-2015]
8 NOVEMBER 2016

ARBITRATION: *Agreement – Jurisdiction of court – Korean company appointed Malaysian subcontractor for building project – Dispute arose – Matter referred to arbitration – Korean company filed petition for rehabilitation order at South Korean Court while arbitration still going on – Whether subcontractor participated in proceedings at South Korean Court – Whether claim in arbitration proceedings taken over by rehabilitation scheme event – Whether Korean company entitled to apply for award in arbitration for same debt – Whether arbitrator had mandate to grant award over debt which was admitted in foreign jurisdiction by consent of both parties – Whether questions referred to High Court were questions of law – Whether High Court had jurisdiction to hear application – Arbitration Act 2005, s. 41*

The respondent, a Korean company, appointed the appellant as the subcontractor for a building project. When a dispute arose between the parties, the matter was referred to an arbitration where the appellant (i) claimed for RM7,460,728.56; and (ii) an interim award of RM6,624,245.36. While the arbitration proceedings were still on-going, the respondent filed a petition for a rehabilitation order at the South Korean Court ('the SKC') which issued a commencement order for the rehabilitation exercise. The effect of such exercise was such that the chief executive officer of the respondent became the trustee/manager to oversee the rehabilitation exercise. Under his term of reference, the trustee/manager was entitled to reject or accept claims from the creditors of the respondent. The appellant lodged its claim with the trustee/manager of the appellant in the sum of RM7,460,728.56. The trustee/manager did not accept the full claim and reduced the same to only RM6,624,245.36. The effect of such admission by the trustee/manager made the appellant a recognised creditor in the rehabilitation exercise of the SKC proceedings. At the Malaysian High Court, the respondent submitted that in view of the appellant's participation in the SKC proceedings, the appellant's claim in the arbitration proceedings had been taken over by the rehabilitation scheme event and consequently, the appellant was entitled to be paid for the admitted sum of RM6,624,245.36. Furthermore, the appellant was debarred from continuing with its claim of RM7,460,728.56 at the arbitration proceeding as that would amount to duplicity of proceeding and undermine the integrity of the rehabilitation exercise in South Korea. The appellant contended that they did not participate in the South Korean Court proceeding willingly and at no time

agreed to be bound by the rehabilitation exercise. The issues before the High Court were (i) given the status of the rehabilitation proceedings in the SKC, was the appellant entitled to apply for an award in the arbitration for the same debt; and (ii) whether the arbitrator had the mandate to grant an award over debt which was admitted and made subject to a rehabilitation scheme in a foreign jurisdiction by the consent of both parties. The High Court Judge ('the HCJ') answered the two questions in the negative. Hence, the present appeal.

Held (allowing appeal; setting aside orders of High Court and ordering arbitration to continue)

Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) Under s. 41 of the Arbitration Act 2005, the questions referred to the High Court must be questions of law arising in the course of proceedings. The High Court's jurisdiction to hear such application was premised only on the existence of a question of law which formed the subject matter of the application itself. The High Court was fully-entitled to strike out the application if the same did not contain questions of law. (para 15)

(2) The HCJ omitted the preliminary task of determining whether the questions referred were questions of law. From the conflicting contentions of the appellant and the respondent, both the arbitrator and HCJ failed to observe that the questions posed were in fact on the assumption that the appellant agreed to forfeit its rights in the arbitration proceedings in exchange for the participation in the SKC proceedings. The assumption was misplaced. The HCJ derived jurisdiction only when the very subject matter of the application related to pure question of law and when it is not, there is a complete lack of jurisdiction. (paras 18 & 19)

(3) The appellant strongly contended its participation in the SKC proceedings could not be equated to a forfeiture of its rights in the arbitration proceedings while the respondent contended otherwise. These divergent views plainly gave rise to a serious dispute of fact which was within the jurisdiction of the arbitrator to determine. Such determination could only be adjudicated by way of oral evidence from witnesses of both the appellant and the respondent. The arbitration proceedings stemmed from a written agreement between the appellant and the respondent and any variation of the arbitration agreement or any written document should be by way of a written waiver. (para 19)

Bahasa Malaysia *Headnotes*

Responden, sebuah syarikat dari Korea, melantik perayu sebagai subkontraktor bagi satu projek pembinaan. Apabila timbul pertikaian antara pihak-pihak, hal perkara tersebut dirujuk kepada timbang tara dan perayu (i) menuntut RM7,460,728.56; dan (ii) award interim sebanyak

RM6,624,245.36. Sementara prosiding timbang tara masih berjalan, responden memfailkan petisyen perintah pemulihan di Mahkamah Korea Selatan ('MKS') yang mengeluarkan pemulaan perintah langkah pemulihan. Kesan langkah demikian adalah ketua pegawai eksekutif responden menjadi pemegang amanah/pengurus yang menyelia langkah pemulihan. Bawah bidang tugasnya, pemegang amanah/pengurus berhak menolak atau menerima tuntutan-tuntutan daripada pemiutang responden. Perayu memfailkan tuntutan mereka yang berjumlah RM7,460,728 kepada pemegang amanah/pengurus perayu. Pemegang amanah/pengurus tidak menerima tuntutan penuh dan mengurangkan jumlah tersebut menjadi RM6,624,245.36 sahaja. Dengan penerimaan oleh pemegang amanah/pengurus, perayu diiktiraf sebagai pemiutang dalam langkah pemulihan prosiding MKS. Di Mahkamah Tinggi Malaysia, responden menghujahkan bahawa berdasarkan penglibatan perayu dalam prosiding MKS, tuntutan perayu dalam prosiding timbang tara diambil alih oleh skima pemulihan dan akibatnya, perayu berhak dibayar jumlah yang diakuinya sahaja iaitu RM6,624,245.36. Tambahan lagi, perayu dilarang daripada meneruskan dengan tuntutan mereka sebanyak RM7,460,728.56 dalam prosiding timbang tara kerana ini terjumlah sebagai kependuaan prosiding dan menjejaskan integriti langkah pemulihan di MKS. Perayu menyatakan mereka tidak terlibat dalam prosiding MKS dan tidak pernah bersetuju untuk terikat dengan langkah pemulihan. Isu-isu yang dibangkitkan di Mahkamah Tinggi adalah (i) berdasarkan status prosiding pemulihan di MKS, adakah perayu berhak memohon award dalam timbang tara bagi hutang yang sama; dan (ii) sama ada penimbang tara mempunyai mandat untuk memberi award bagi hutang yang diakui dan tertakluk pada skima pemulihan dalam bidang kuasa asing dengan kebenaran pihak-pihak. Hakim Mahkamah Tinggi ('HMT') menjawab kedua-dua soalan secara negatif. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan perintah-perintah Mahkamah Tinggi dan memerintahkan agar timbang tara diteruskan)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Bawah s. 41 Akta Timbang Tara 2005, soalan-soalan yang dirujuk kepada Mahkamah Tinggi mestilah soalan-soalan undang-undang yang dibangkitkan semasa prosiding. Bidang kuasa Mahkamah Tinggi untuk membicarakan permohonan sedemikian hanya berasaskan pada kewujudan soalan undang-undang yang membentuk hal perkara permohonan itu sendiri. Mahkamah Tinggi berkuasa penuh untuk membatalkan permohonan tersebut jika tidak mengandungi soalan-soalan undang-undang.

(2) Hakim Mahkamah Tinggi tidak menjalankan tugas awalan iaitu menentukan sama ada soalan-soalan yang dirujuk adalah soalan-soalan undang-undang. Berdasarkan keterangan perayu dan responden yang

saling bercanggah, kedua-dua penimbang tara dan HMT gagal melihat bahawa soalan-soalan yang diaju sebenarnya berasaskan anggapan bahawa perayu bersetuju melupuskan haknya dalam prosiding timbang tara sebagai ganti penglibatannya dalam prosiding MKS. Anggapan tersebut salah. Hakim Mahkamah Tinggi hanya berbidang kuasa apabila hal perkara dalam pertikaian berkait dengan soalan undang-undang semata-mata dan apabila tiada, bidang kuasa ini tidak timbul.

(3) Perayu dengan tegas menghujahkan penglibatannya dalam prosiding MKS tidak boleh disamakan dengan pelupusan hak-haknya dalam prosiding timbang tara manakala responden menghujahkan sebaliknya. Pandangan berbeza ini dengan jelas membangkitkan pertikaian fakta serius yang terangkum dalam bidang kuasa penentuan penimbang tara. Pemutusan sedemikian hanya boleh dibuat melalui keterangan lisan saksi-saksi perayu dan responden. Prosiding timbang tara timbul susulan perjanjian bertulis antara perayu dan responden dan apa-apa pengubahan perjanjian timbang tara atau apa-apa dokumen bertulis mesti dibuat melalui penepian bertulis.

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Hoe v. Manningham City Council [2011] VSC 37 ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 41(1)(a)

For the appellant - Sanjay Mohanasundram & K Gobinath; M/s Mohanadass Partnership
For the respondent - See Jooi Hong, Kee Meng Fai & Terence Loh; M/s Belden

[Editor's note: For the High Court judgment, please see Kukdong Engineering & Construction Co Ltd v. Bauer (M) Sdn Bhd [2015] 1 LNS 733 (overruled).]

Reported by Najib Tamby

JUDGMENT

David Wong Dak Wah JCA:

Nature Of Proceeding

[1] This is an appeal against the High Court decision in which the learned judge dealt with two questions of law referred to her by the respondent with the consent of the arbitrator pursuant to s. 41(1)(a) of the Arbitration Act 2005.

[2] Those two questions of law were these:

(i) given the status of the rehabilitation proceedings in South Korea, is the appellant entitled to apply for an award in this arbitration for the same debt?

(ii) further and/or alternatively, does the arbitrator have jurisdiction or the mandate to grant an award over a debt which has been admitted and made subject to a rehabilitation scheme in a foreign jurisdiction by consent of both parties?

[3] The learned judge answered the two questions of law in the negative which in essence produced a result prejudicial to the appellant's/ defendant's claim against the respondent/plaintiff in the arbitration proceedings between the parties. The factual matrix upon which this appeal stemmed from was these.

Background Facts

[4] The respondent had appointed the appellant on 26 April 2011 as the subcontractor to execute and complete the bored piling and alternative secant pile works in respect of a project consisting of mixed commercial and residential buildings in Jalan Ampang, Federal Territory Kuala Lumpur.

[5] Disputes arose between the parties which resulted in the suit taken out by the respondent in the Kuala Lumpur High Court. That Kuala Lumpur suit was then stayed pending reference to arbitration. In the arbitration proceeding, the appellant had claimed for the uncertified application for payments (no. 7-11) in the sum of RM7,460,728.56. On 3 July 2013, the appellant sought for an interim award of RM6,624,245.36 from the arbitrator premised on the respondent's admission of the aforesaid sum.

[6] During the arbitration proceeding, the respondent, being a Korean company, had filed a petition for a rehabilitation order in the South Korea Court which on 11 October 2012 issued a commencement order for the rehabilitation exercise. The effect of such exercise was such that the chief executive officer of the respondent became trustee/manager to oversee the rehabilitation exercise. Under his term of reference, the trustee/manager was entitled to reject or accept claims from the creditors of the respondent.

[7] On 18 February 2013, the appellant lodged their claim with the trustee/manager of the appellant in the sum of RM7,460,728.55. After giving due consideration to the appellant's claim, the trustee/manager on 18 March 2013 did not accept the full claim but reduced the same to a sum of only RM6,642,245.36. The effect of such admission by the trustee/ manager made the appellant a recognised creditor in the rehabilitation exercise of the South Korean Court proceedings. Not happy with the acknowledged reduced amount, the appellant lodged an appeal to the South Korean Court on or about 20 March 2013.

A **High Court Proceeding**

Respondent's Contention

[8] From the above facts, the respondent had submitted before the learned judge that in view of the participation of the appellant in the South Korean
B Court proceeding, the claim of the appellant in the arbitration proceeding had been taken over by the rehabilitation scheme event. The effect of which was that the appellant is now entitled to be paid for the admitted sum of RM6,624,245.36 in the manner as provided, that is, 77% of the debt to be converted to equity with the remaining 23% of the debt to be repaid in cash
C over a period of ten years. Further, the appellant is debarred from continuing with their claim of RM7,460,728.56 arbitration proceeding as that would amount to duplicity of proceeding and undermine the integrity of the rehabilitation exercise in South Korea.

Appellant's Contention

D **[9]** In substance, the appellant before the learned judge submitted that they did not participate in the South Korean Court proceeding willingly and at no time agreed to be bound by the rehabilitation exercise in that their claim in the arbitration proceeding is to be taken over by the South Korean Court proceeding. Further, it was contended that they had to participate in
E the South Korean proceeding as they were informed that if they did not participate, there was a chance that based on South Korea law, they would not be paid even if they succeeded in their claim in the arbitration proceeding. As far as the appellant was concerned, there was an admission of RM6,624,245.36 in the South Korean rehabilitation exercise and they are
F entitled to apply to the arbitrator for an interim award for the admitted sum and to have the balance sum of RM836,483.20 adjudicated by the arbitrator.

Section 41(1)(a) Of Arbitration Act 2005

[10] The respondent upon seeing the appellant's application for an interim award of the admitted sum, invoked s. 41 which reads as follows:
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> (1) Any party may apply to the High Court to determine any question of law arising in the course of the arbitration:
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> (a) with the consent of the arbitral tribunal; or
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> (b) with the consent of every other party.
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H (2) The High Court shall not consider an application under subsection (1) unless it is satisfied that the determination:
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> (a) is likely to produce substantial savings in costs; and
>
> (b) substantially affects the rights of one or more of the parties.
>
I (3) The application shall identify the question of law to be determined and, except where made with the agreement of all parties to the proceedings, shall state the grounds that support the application.

(4) While an application under subsection (1) is pending, the arbitral proceedings may be continued and an award may be made.

[11] The respondent framed the above two questions of law to which the arbitrator had consented to.

Question 1

[12] The learned judge answered this question in the negative which in effect held that the appellant had given up their right to continue with the present arbitration proceeding. Learned judge in coming to her decision had relied on an expert opinion on South Korean law, one Tae Soo Jung, an attorney at law in South Korea with 18 years of practising law, specialising in bankruptcy and corporate restructuring. The crucial paragraph relied on was para. 12 which reads as follows:

c. The rehabilitation scheme commenced by Kukdong and the approved repayment scheme is binding on Bauer and

d. Bauer cannot receive more than what was approved under the repayment scheme.

[13] Premised on that para. 12 together with the fact that there was no rebuttal expert opinion plus the fact that the appellant had participated in the South Korean Court proceeding, the learned judge applied the concept of estoppel as set out in much quoted case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 and held that the appellant was estopped from continuing with the arbitration.

Question 2

[14] Learned judge also answered this question 2 in the negative in view of her answer to question 1.

Our Grounds Of Decision

[15] To recapitulate, s. 41 of the Arbitration Act 2005 can only be resorted to when the questions to be referred to the High Court must be questions of law arising "in the course of the proceedings". In other words, the High Court's jurisdiction to hear such application is premised only on the existence of a question of law which forms the subject matter of the application itself. As it is a jurisdiction issue, the High Court must be satisfied that there are questions of law involved even though as in this case the application was made with the consent of the arbitrator. The High Court is fully entitled to strike out the application if the same does not contain questions of law.

[16] Hence, the first task of the learned judge was to identify the precise questions of law. Such importance is alluded in *Hoe v. Manningham City Council* [2011] VSC 37 where the learned judge there dealt with a statutory provision of appeal which permits appeal relating only to "error of law" and this is what he said:

> The need to identify precisely an error of law is important also to identify and define the subject matter and ambit of any appeal to this court and thus to ensure that the statutory appellate jurisdiction of this court is lawfully engaged, defined and circumscribed.
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> The Court's jurisdiction to hear an appeal depends upon there being a question of law in issue but it is only the question of law which the Court is permitted by the statutory appeals jurisdiction to consider. The fact that a question of law may have been involved in a decision does not permit the whole of the decision to be agitated upon an appeal. The question of law is the trigger for an appeal but is also the entire subject matter of the appeal and for both purposes it is essential that the question of law said to have been erroneously decided is identified exactly.

[17] The task of determining what is a question of law and question of fact is sometimes not an easy task. The learned authors in *Aronson, Dyer and Groves Judicial Review of Administrative Action,* 3rd edn Lawbook Co 2004 puts it this way:

> Secondary literature abounds with derision and scorn for those who attempt to find objective criteria for distinguishing between errors of fact and law. The distinction certainly admits of a degree of manipulability. At the same time as saying that the distinction is "vital" in many legal contexts, the High Court has acknowledged that "no satisfactory test of universal application has yet been formulated.
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> …
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> It is not therefore surprising to find statements of despair or even cynicism littered through the law reports. Professor Endicott asserts that "Lord Denning … followed an unswerving rule of calling a question a 'question of law' when he wanted to." … the distinction between error of law and fact has been called slippery, elusive, too easily manipulated, "sterile and technical", and something which can generate "artificial, if not illusory" distinctions. Some have wondered whether it might not be meaningless. …..
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> … A question of fact involves an inquiry into whether something happened or will happen, and is quite separate from any assertion as to its legal effect. A question of law involves the identification and interpretation of a norm which is usually of general application.

[18] Reverting to the issue at hand, we, with respect, were of the view that learned judge had omitted this preliminary task of determining whether the questions referred were in fact questions of law. In view of that omission, that task then fell on us to determine. From the conflicting contentions of the

appellant and respondent, we were of the view that both the arbitrator and the learned judge failed to observe that the questions posed to the court were in fact on the assumption that the appellant had agreed to forfeit their rights in the arbitration proceeding in exchange for their participation in the South Korean Court proceedings.

[19] The aforesaid assumption, with respect, was misplaced. As pointed out earlier, the appellant had strongly contended that their participation in the South Korean Court proceedings could not be equated to a forfeiture of their rights in the arbitration proceeding and the respondent had also strongly contended otherwise. These divergent views plainly gave rise to a serious dispute of fact which was within the jurisdiction of the arbitrator to determine. Such determination can only be adjudicated by way of oral evidence from witnesses of both the appellant and respondent. The learned judge spoke of waiver and estoppel on the part of the appellant but surely whether the appellant's conduct in the South Korea Court proceedings amounted to a waiver or an estoppel was a question of fact and not law. The question of why there was a lack of written waiver of their rights in the arbitration proceeding on the part of the appellant must be explained by both the appellant and the respondent. We must not lose sight at the fact that the arbitration proceeding stemmed from a written agreement between the appellant and respondent and generally speaking any variation of that arbitration agreement or for that matter any written document should be by way of a written waiver.

[20] As reiterated earlier, the learned judge derived jurisdiction only when the very subject matter of the application related to pure question of law and when it is not, then there is a complete lack of jurisdiction.

Conclusion

[21] This was a case where the jurisdiction of the High Court could not be waived by the parties including the arbitrator. The High Court's jurisdiction under s. 41 of the Arbitration Act is derived only when the question framed related to a pure question of law.

[22] In this case, a dispute of fact as to whether there was a waiver of rights in the arbitration proceeding by the appellant had to be resolved first by the arbitrator who is the trier of facts before the questions framed could be asked and answered. As that dispute of fact had not been resolved, we were constrained to and did allow the appeal with no order as to costs. We also set aside the orders of the High Court and ordered the arbitration to continue.